

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED FEB 11 1938

IN THE *Joseph W. Stewart*
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1938.

No. *7109.*

JOHN CARSON,
ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC., ET AL.,

against

NATIONAL BITUMINOUS COAL COMMISSION OF THE
DEPARTMENT OF THE INTERIOR.

**PETITION TO REVIEW AND MODIFY AN ORDER
OF THE NATIONAL BITUMINOUS COAL COM-
MISSION.**

ALLEN COE,
Counsel for John Carson.

WILBUR LA ROE, JR.,
FREDERICK E. BROWN,
ARTHUR L. WINN, JR.,
Counsel for Other Petitioners.

IN THE
United States Court of Appeals
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JOHN CARSON,
ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC., ET AL.,

against

NATIONAL BITUMINOUS COAL COMMISSION OF THE
DEPARTMENT OF THE INTERIOR.

**PETITION TO REVIEW AND MODIFY AN ORDER
OF THE NATIONAL BITUMINOUS COAL COM-
MISSION.**

*To the Honorable Judges of the United States Circuit
Court of Appeals for the District of Columbia:*

Come now John Carson, Consumers' Counsel under the Bituminous Coal Act of 1937, for and on behalf of Associated Industries of New York State, Inc., and its members, Associated Industries of New York State, Inc., in its own right, and the following companies severally in their own right:

Carthage Paper Makers, Inc.,
Utica and Mohawk Cotton Mills Company,

Jamestown Veneer & Plywood Corporation,
 Syracuse Chilled Plow Company, Inc.,
 Oldbury Electro-Chemical Company,
 Shenandoa Rayon Corporation,
 The Racquette River Paper Company,
 Charles C. Kellogg & Sons Company,
 Gleason Works,
 Consolidated Car-Heating Company, Inc.,
 Duffy Mott Company, Inc.,
 Fort Schuyler Knitting Company,
 Larkin Company, Inc.,
 Little Falls Manufacturing Company,
 General Plastics, Inc.,
 Comstock Canning Corporation,
 Lockport Cotton Batting Company,
 S. A. Cook & Company,
 Richardson Corporation,
 Hooker Electrochemical Company

and being aggrieved thereby petition this Honorable Court to review and modify the order of the National Bituminous Coal Commission of the Department of the Interior entered on the 15th day of December, 1937, dismissing the petition of John Carson, as Consumers' Counsel, for and on behalf of Associated Industries of New York State, Inc., and its members, which stated dissatisfaction with the minimum prices of coals of code members produced in Districts Nos. 1 to 13, inclusive, when for sale in the State of New York, as established by orders Nos. 89 to 101, inclusive, effective December 16, 1937, and prayed a stay of the effective dates of such orders until a public hearing in conformity with Section 2(a) of the Coal Act should be held at which the Commission should disclose the facts underlying and substantiate its determination of minimum prices, including their coordination, and should substantiate the fixing of materially higher min-

imum prices for consumers in the State of New York than for their competitors in other states; and in support of this petition for modification your petitioners show to this Honorable Court:

I.

(1) That John Carson is Consumers' Counsel under the Bituminous Coal Act of 1937, appointed by the President of the United States, confirmed in this appointment by the Senate of the United States, and duly qualified, charged with the duty of protecting the interest of the consuming public before the National Bituminous Coal Commission and safeguarding the administration of the Bituminous Coal Act of 1937, and, the consumers parties hereto having made formal demand upon him to join in this appeal from the action of the Coal Commission in making the order herein complained of to have the said order reviewed and modified to conform to law, said John Carson joins in this petition in his official capacity as Consumers' Counsel.

(2) That your petitioner, Associated Industries of New York State, Inc., is a corporation organized and existing under the laws of the State of New York, with principal office at 361 Delaware Avenue, Buffalo, N. Y., being an association of 1462 manufacturers with plants located in the State of New York.

(3) That your petitioner, Carthage Paper Makers, Inc., is a corporation organized and existing under the laws of the State of New York, with principal office at Carthage, N. Y.; that your petitioner, Utica and Mohawk Cotton Mills, Inc., is a corporation organized and existing under the laws of the State of New York, with principal office at Utica, N. Y.; that your petitioner, Jamestown Veneer & Plywood Corporation, is a corporation organized and existing under the laws of the

State of New York, with principal office at Jamestown, N. Y.; that your petitioner, Syracuse Chilled Plow Company, Inc., is a corporation organized and existing under the laws of the State of New York, with principal office at Syracuse, N. Y.; that your petitioner, Oldbury Electro-Chemical Company, is a corporation organized and existing under the laws of the State of New York, with principal office at Niagara Falls, N. Y.; that your petitioner, Shenandoa Rayon Corporation, is a corporation organized and existing under the laws of the State of Delaware, with principal office at Utica, N. Y.; that your petitioner, The Racquette River Paper Company, is a corporation organized and existing under the laws of the State of New York, with principal office at Potsdam, N. Y.; that your petitioner, Charles C. Kellogg & Sons Company, is a corporation organized and existing under the laws of the State of New York, with principal office at Utica, N. Y.; that your petitioner, Gleason Works, is a corporation organized and existing under the laws of the State of New York, with principal office at Rochester, N. Y.; that your petitioner Consolidated Car-Heating Company, Inc., is a corporation organized and existing under the laws of the State of New York, with principal office at Albany, N. Y.; that your petitioner, Duffy Mott Company, Inc., is a corporation organized and existing under the laws of the State of New York, with plants at Holley, Hamlin, Ravena, and Voorheesville, N. Y.; that your petitioner, Fort Schuyler Knitting Company, is a corporation organized and existing under the laws of the State of New York, with principal office at Utica, N. Y.; that your petitioner, Larkin Company, Inc., is a corporation organized and existing under the laws of the State of New York, with principal office at Buffalo, N. Y.; that

your petitioner, Little Falls Manufacturing Company, is a corporation organized and existing under the laws of the State of New York, with principal office at Little Falls, N. Y.; that your petitioner, General Plastics, Inc., is a corporation organized and existing under the laws of the State of New York, with principal office at North Tonawanda, N. Y.; that your petitioner, Comstock Canning Corporation, is a corporation organized and existing under the laws of the State of New York, with principal office at Newark, N. Y.; that your petitioner, Lockport Cotton Batting Company, is a corporation organized and existing under the laws of the State of New York, with principal office at Lockport, N. Y.; that your petitioner, S. A. Cook & Company, is a corporation organized and existing under the laws of the State of New York, with principal office at Medina, N. Y.; that your petitioner, Richardson Corporation, is a corporation organized and existing under the laws of the State of New York, with principal office at Rochester, N. Y.; and your petitioner, Hooker Electrochemical Company, is a corporation organized and existing under the laws of the State of New York, with principal office at Niagara Falls, N. Y.

II.

(1) That on the 30th day of November, 1937, National Bituminous Coal Commission entered its orders Nos. 89 to 101, inclusive, fixing minimum prices for coals of code members produced in Districts Nos. 1 to 13, inclusive, effective December 16, 1937, which said orders are published and set forth in Volume 2, No. 234, of the Federal Register at pages 2992 to 3087, which orders will be judicially noticed under "An Act to Provide for the Custody of Federal Proclamations, Orders, Regula-

tions, Notices, and other Documents, and for the Prompt and Uniform Printing and Distribution thereof," approved July 26, 1935 (49 Stat. L. Chap. 417), which orders are hereby referred to and prayed to be considered a part hereof as though fully set forth herein.

(2) That John Carson, as Consumers' Counsel, filed with the National Bituminous Coal Commission on the 14th day of December, 1937, at the solicitation of and for and on behalf of Associated Industries of New York State, Inc., and its members, a petition stating, among other things:

(a) That Associated Industries of New York State, Inc., is an association of approximately 1500 manufacturers located in the State of New York, of whom 525 consumed in the calendar year 1936 approximately 12,000,000 tons of bituminous coal;

(b) That members of Associated Industries have an investment of approximately \$4,000,000,000 in the State of New York and employ between 600,000 and 700,000 of the 1,200,000 persons normally employed in factories in the State of New York;

(c) That under the minimum prices published by the Commission in its orders entered November 30, 1937, members of Associated Industries, based on a consumption of approximately 12,500,000 tons of coal annually, would be obliged to pay approximately \$5,500,000 more per year than their competitors in manufacturing industries in other consuming states covered by said orders, including the states of Ohio, Michigan, Indiana and Illinois, and that the minimum prices contained in the minimum price orders constituted a discrimination against manufacturers who are consumers of bituminous coal in the State of New York;

(d) That members of Associated Industries are engaged in keen competition with industries located in the aforesaid states and other states covered by the price orders and that the manufacturers of the State of New York would be irreparably damaged and injured if the prices became effective on December 16, 1937, as ordered;

(e) That the Commission in the fixing of its minimum prices had improperly selected basing points for freight rates and in the determination of prices had "loaded" the price when for shipment into New York State;

(f) That the prices when for sale in New York State were 20 per cent higher than the prices established for coals when sold in other states, and would result in a burden on New York State consumers and taxpayers of \$10,000,000 annually in excess of the prices for the same qualities and quantities, grades and sizes of coal fixed for other states covered by the orders;

(g) That a complete investigation and development of the facts were necessary in order that proper relationships as between various consuming market areas could be determined equitably and justly and in a manner which would not place an undue burden upon one section as compared with another and that, without knowing the facts on which the Commission had determined its minimum prices, Associated Industries and its members were unable to determine how said prices were established or why consumers in the State of New York are required to pay substantially higher prices than consumers of coal in other states;

(h) That the minimum prices provided by the Commission in its said orders increased the prices of coal to New York State consumers approximately 25 per cent, the prices prior to December 16, 1937, at typical mines supplying typical New York State consumers being an average of \$1.73

tions, Notices, and other Documents, and for the Prompt and Uniform Printing and Distribution thereof," approved July 26, 1935 (49 Stat. L. Chap. 417), which orders are hereby referred to and prayed to be considered a part hereof as though fully set forth herein.

(2) That John Carson, as Consumers' Counsel, filed with the National Bituminous Coal Commission on the 14th day of December, 1937, at the solicitation of and for and on behalf of Associated Industries of New York State, Inc., and its members, a petition stating, among other things:

(a) That Associated Industries of New York State, Inc., is an association of approximately 1500 manufacturers located in the State of New York, of whom 525 consumed in the calendar year 1936 approximately 12,000,000 tons of bituminous coal;

(b) That members of Associated Industries have an investment of approximately \$4,000,000,000 in the State of New York and employ between 600,000 and 700,000 of the 1,200,000 persons normally employed in factories in the State of New York;

(c) That under the minimum prices published by the Commission in its orders entered November 30, 1937, members of Associated Industries, based on a consumption of approximately 12,500,000 tons of coal annually, would be obliged to pay approximately \$5,500,000 more per year than their competitors in manufacturing industries in other consuming states covered by said orders, including the states of Ohio, Michigan, Indiana and Illinois, and that the minimum prices contained in the minimum price orders constituted a discrimination against manufacturers who are consumers of bituminous coal in the State of New York;

(d) That members of Associated Industries are engaged in keen competition with industries located in the aforesaid states and other states covered by the price orders and that the manufacturers of the State of New York would be irreparably damaged and injured if the prices became effective on December 16, 1937, as ordered;

(e) That the Commission in the fixing of its minimum prices had improperly selected basing points for freight rates and in the determination of prices had "loaded" the price when for shipment into New York State;

(f) That the prices when for sale in New York State were 20 per cent higher than the prices established for coals when sold in other states, and would result in a burden on New York State consumers and taxpayers of \$10,000,000 annually in excess of the prices for the same qualities and quantities, grades and sizes of coal fixed for other states covered by the orders;

(g) That a complete investigation and development of the facts were necessary in order that proper relationships as between various consuming market areas could be determined equitably and justly and in a manner which would not place an undue burden upon one section as compared with another and that, without knowing the facts on which the Commission had determined its minimum prices, Associated Industries and its members were unable to determine how said prices were established or why consumers in the State of New York are required to pay substantially higher prices than consumers of coal in other states;

(h) That the minimum prices provided by the Commission in its said orders increased the prices of coal to New York State consumers approximately 25 per cent, the prices prior to December 16, 1937, at typical mines supplying typical New York State consumers being an average of \$1.73

per ton as compared with the prices provided in the Commission's minimum price orders averaging \$2.28 per ton; and

(i) Prayed that the Commission hold a public hearing and develop the facts underlying the level of minimum prices and differentials established, that the Commission substantiate the discrimination against consumers in the State of New York and the substantially higher prices fixed for sale to such consumers than to their competitors in other states, and that the effective date of the said prices be postponed "until your petitioner and other parties in interest have been granted a public hearing, the matters inquired about have been fully developed in the record, and your petitioner has had an opportunity to fully study the situation and present its cause and that of its members."

III.

(1) That the National Bituminous Coal Commission, without hearing, but following oral presentation thereof, by order entered December 15, 1937, made a part hereof as Appendix A, dismissed the said petition on behalf of Associated Industries of New York State, Inc., and its members and failed and refused to suspend the operation of its said price orders Nos. 89 to 101, inclusive, and the said orders became effective December 16, 1937, and are now in effect as amended and supplemented.

(2) That John Carson, as Consumers' Counsel, for and on behalf of Associated Industries of New York State, Inc., and its members individually named, filed with the National Bituminous Coal Commission on January 24, 1938, a petition, made a part hereof as Appendix B, for reconsideration by the Commission of its order dated December 15, 1937, and in said peti-

tion for reconsideration stated the grounds therefor, the objections to the order made December 15, 1937, dismissing the petition seeking stay of the operation of the said minimum price orders, prayed anew suspension of said minimum price orders, and recited as to members of Associated Industries of New York State, Inc., and more particularly as to illustrative typical named individual members thereof, the following facts, among others:

(a) That the supply of coal on hand of the following companies would be exhausted during January, 1938, or before February 15, 1938, and that before the supply was exhausted these companies would have to purchase additional coal at the substantially higher prices provided in the Commission's minimum price orders Nos. 89 to 101, inclusive:

Jamestown Veneer & Plywood Corporation,
 Utica and Mohawk Cotton Mills Company,
 Syracuse Chilled Plow Company, Inc.,
 Shenandoa Rayon Corporation,
 The Racquette River Paper Company,
 Charles C. Kellogg & Sons Company,
 Gleason Works,
 Consolidated Car-Heating Company, Inc.,
 Duffy Mott Company, Inc.,
 Fort Schuyler Knitting Company,
 Larkin Company, Inc.,
 Little Falls Manufacturing Company,
 S. A. Cook & Company,
 Richardson Corporation;

(b) That the listed companies, and other members of Associated Industries, have written contracts with code members or carload distributors (who have applied to the Coal Commission for registration in order to qualify as licensed wholesalers, which is necessary under the Commission's

Marketing Rules and Regulations before such distributors may receive any sales discounts from a code producer) which were annulled or modified by the said minimum price orders;

(c) That under said written contracts if continued in force and unmodified by the said minimum price orders the companies would be able of right to purchase coal at prices lower than the minimum prices fixed by the Commission in its orders Nos. 89 to 101, inclusive;

(d) That many of the written contracts of members of Associated Industries with code producers and carload distributor provide that the prices therein are subject to change by minimum price orders of the National Bituminous Coal Commission;

(e) That the code producers and wholesale distributors have uniformly refused to perform the said contracts except as modified by the minimum price orders, have repudiated the contracts as to prices, and have demanded the prices set forth in the Commission's minimum price orders; and

(f) That the written contracts of the following companies, among others, terminate on March 31 or April 1, 1938, and that following such dates these companies must purchase coal in the open market or under new contracts at the minimum prices provided by the Commission in its said minimum price orders Nos. 89 to 101, inclusive, as amended and supplemented:

Utica and Mohawk Cotton Mills Company,
Syracuse Chilled Plow Company, Inc.,
Oldbury Electro-Chemical Company,
Consolidated Car-Heating Company, Inc.,
Charles C. Kellogg & Sons Company,
Larkin Company, Inc.,
Little Falls Manufacturing Company.

(3) The Commission did not upon the filing of the petition for reconsideration or at any time since suspend or stay the said orders fixing minimum prices and they have remained in effect and are now in effect. The Commission has taken no action upon the petition for reconsideration and petitioners are unable to withhold the filing of this petition until action by the Commission because of the statutory requirement that petition for review must be filed with the court within sixty days after entry of the order to be reviewed and the imminent irreparable injury to members of Associated Industries of New York State, Inc., unless the minimum price orders are suspended.

IV.

That the minimum price orders of the National Bituminous Coal Commission Nos. 89 to 101, inclusive, issued November 30, 1937, and made effective December 16, 1937—

(a) were not made in any proceeding or following any hearing or notice of hearing, and do not purport to have been so made;

(b) are unsupported by any findings of fact based on any evidence, information or data contained in the record in any public proceeding, and do not purport to be so supported; and

(c) were unsupported by any facts disclosed by the Commission in any public proceeding as underlying or substantiating the minimum prices fixed or the coordination of prices, and do not purport to be so supported.

V.

That in making the said order of dismissal dated December 15, 1937, and in failing and refusing to suspend the operation and effectiveness of its minimum price orders Nos. 89 to 101, inclusive, in so far as they fix minimum prices for sale in the State of New York of coals produced by code members, the National Bituminous Coal Commission erred as a matter of law in the following respects:

(1) Orders of the Commission fixing minimum prices are rules and regulations having the force and effect of law and under Section 2(a) of the Bituminous Coal Act of 1937 can not be made effective or operative unless the Commission shall have given reasonable public notice of a hearing; unless the Commission shall have afforded to interested parties an opportunity to be heard; and unless the Commission shall have made findings of fact; yet the Commission ordered its minimum prices into effect December 16, 1937, without hearing or notice of hearing and without making any findings of fact.

(2) The Commission failed to support any of the said price orders with the findings of fact specified in Section 4, Part II (a)(b) of the Bituminous Coal Act of 1937 which are indispensable prerequisites to the validity of the said orders.

(3) The said minimum price orders Nos. 89 to 101, inclusive, were merely tentative or proposed minimum prices which the Commission was without power to order into effect December 16, 1937, there having been filed with the Commission on December 14, 1937, for and on behalf of Associated Industries of New York

State, Inc., and its members complaint under Sections 4, Part II (d) of the Bituminous Coal Act of 1937 stating dissatisfaction with the minimum prices and their coordination and seeking stay of said orders; and the Commission was required and bound by the Act upon the filing of the said complaint to suspend the operation and effectiveness of the said minimum price orders in so far as they fixed prices for sale in New York State.

(4) In failing to suspend the said price orders and in making them effective December 16, 1937, the Commission nullified and modified contracts of members of Associated Industries of New York State, Inc., with code coal producers and wholesale carlot distributors and coerced and compelled said coal sellers to repudiate said contracts by requiring that higher prices than provided in such contracts must be charged by the coal sellers parties thereto, except under the prohibitive penalties provided in the Act and in the Commission's Marketing Rules and Regulations, and deprived members of Associated Industries of New York State, Inc., of their liberty to make normal and usual business contracts and of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States to the great and irreparable injury of said members and each of them.

WHEREFORE, your petitioners pray:

1. That this Honorable Court will issue and serve upon the National Bituminous Coal Commission an order requiring it forthwith to certify to this Court a transcript of the entire record and proceedings before the Commission in its proceeding designated Docket No. 107-FD;

2. That pending final determination upon this appeal, this Honorable Court enter an order staying the operation of the said orders of the Commission Nos. 89 to 101, inclusive, by modifying until further order of this Court the said order of December 15, 1938, in Docket No. 107-FD, so as to suspend and stay the effectiveness and operation of the said minimum price orders, in so far as they fix minimum prices for coals of code members for sale in the State of New York.

3. That this Honorable Court will review the record, order and proceedings before the National Bituminous Coal Commission in the said proceeding and will modify the said order of December 15, 1938, in Docket 107-FD, so as to suspend and stay the effectiveness and operation of the minimum price orders Nos. 89 to 101, inclusive, in so far as they fix minimum prices for coals of code members for sale in the State of New York, until the requirements of the statute and of due

process have been met, as the National Bituminous Coal Commission was in law bound to do.

JOHN CARSON, CONSUMERS' COUNSEL,
 ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.,
 CARTHAGE PAPER MAKERS, INC.,
 JAMESTOWN VENEER & PLYWOOD CORPORATION,
 OLDBURY ELECTRO-CHEMICAL COMPANY,
 SYRACUSE CHILLED PLOW COMPANY, INC.,
 SHENANDOAH RAYON CORPORATION,
 THE RACQUETTE RIVER PAPER COMPANY,
 CHARLES C. KELLOGG & SONS COMPANY,
 GLEASON WORKS,
 CONSOLIDATED CAR-HEATING COMPANY, INC.,
 DUFFY MOTT COMPANY, INC.,
 FORT SCHUYLER KNITTING COMPANY,
 LARKIN COMPANY, INC.,
 LITTLE FALLS MANUFACTURING COMPANY,
 GENERAL PLASTICS, INC.,
 COMSTOCK CANNING CORPORATION,
 LOCKPORT COTTON BATTING COMPANY,
 S. A. COOK & COMPANY,
 RICHARDSON CORPORATION,
 HOOKER ELECTROCHEMICAL COMPANY,
 UTICA AND MOHAWK COTTON MILLS COMPANY,

By:

ALLEN COE,
Counsel for John Carson.

WILBUR LA ROE, JR.,
 FREDERICK E. BROWN,
 ARTHUR L. WINN, JR.,
Counsel for Other Petitioners.

February 11, 1938.

District of Columbia, ss.

MARK A. DALY, being duly sworn, deposes and says that he is General Secretary of Associated Industries of New York State, Inc., one of the petitioners herein; that he has read the foregoing petition and is familiar with the facts therein stated, and that the same are true, except as to those stated on information and belief, and as to those, he believes them to be true.

(Sgd.) MARK A. DALY.

Subscribed and sworn to before me this 4th day of February, 1938.

(Sgd.) MARION J. BOGER,
Notary Public.

(SEAL)

ACKNOWLEDGMENTS OF SERVICE OF COPY OF PETITION.

The undersigned, being Chief Counsel of National Bituminous Coal Commission, hereby acknowledges receipt of a copy of the petition in the above proceeding this ~~11th~~ day of February, 1938.

Robert W. Knox
per W. Bemo

APPENDIX A.

United States Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Docket No. 107-FD

In the matter of JOHN CARSON, as Consumers' Counsel, on behalf of the Associated Industries of New York State, Incorporated.

Order

The petitioner above named, having filed with the Commission on the 14th day of December 1937, pursuant to the provisions of Section 4, Part II (d), of the Bituminous Coal Act of 1937, a petition alleging dissatisfaction with minimum prices of coals of Code Members produced in Districts Nos. 1 to 13, inclusive, as established by Orders Nos. 89 to 101, inclusive, and praying for a preliminary or temporary order staying the effective date of the aforesaid orders, pending final disposition of said petition; and this matter having come on to be heard before the Commission on the 15th day of December 1937; and the Commission, having heard oral argument in support of such application by petitioner; and it appearing to the Commission that the petitioner has made no reasonable showing of necessity for the preliminary or temporary order prayed for:

Now, THEREFORE, it is hereby ordered:

1. That the application of the petitioner for preliminary or temporary order be and the same is hereby dismissed.

2. That a hearing on said petition will be noticed upon further order of the Commission.

3. That the Secretary of the Commission shall forthwith mail a copy of this order to the petitioner.

By order of the Commission.

Dated this 15th day of December, 1937.

F. WITCHER McCULLOUGH,
Secretary.

(Seal)

APPENDIX B.

UNITED STATES

DEPARTMENT OF THE INTERIOR

NATIONAL BITUMINOUS COAL COMMISSION

DOCKET No. 107-FD

In the matter of JOHN CARSON, as CONSUMERS' COUNSEL
on behalf of the ASSOCIATED INDUSTRIES OF NEW
YORK STATE, INCORPORATED.

PETITION OF CONSUMERS' COUNSEL FOR RE-
CONSIDERATION RE ESTABLISHMENT OF
MINIMUM PRICES IN DISTRICTS 1 TO 13,
FOR AND ON BEHALF OF ASSOCIATED IN-
DUSTRIES OF NEW YORK STATE, INC.

To The Honorable Commissioners of the
National Bituminous Coal Commission:

John Carson, as Consumers' Counsel, for and on
behalf of Associated Industries of New York State,
Inc., and of the following companies members thereof:

Carthage Paper Makers, Inc.,
Utica and Mohawk Cotton Mills Company,
Jamestown Veneer & Plywood Corporation,
Syracuse Chilled Plow Company, Inc.,
Oldbury Electro-Chemical Company,
Shenandoa Rayon Corporation,
The Racquette River Paper Company,
Charles C. Kellogg & Sons Company,
Gleason Works,
Consolidated Car-Heating Company, Inc.,
Duffy Mott Company, Inc.,

Fort Schuyler Knitting Company,
Larkin Company, Inc.,
Little Falls Manufacturing Company,
General Plastics, Inc.,
Comstock Canning Corporation,
Lockport Cotton Batting Company,
S. A. Cook & Company,
Richardson Corporation,
Hooker Electrochemical Company,

presents this petition for reconsideration by the Commission of its order in the present proceeding dated December 15, 1937, and in support of this petition and of petition for stay of the minimum price orders described below, and as grounds of objection to the said order herein dated December 15, 1937, says:

I

1) By petition filed with the Commission December 14, 1937, Consumers' Counsel at the solicitation of Associated Industries of New York State, Inc., and for and on behalf of said Associated Industries and its members, stated dissatisfaction with the minimum prices of coals of code members produced in Districts Nos. 1 to 13, inclusive, when for sale in the State of New York, as established by orders Nos. 89 to 101, inclusive, effective December 16, 1937, and prayed a stay of the effective date of said orders until a public hearing should be held at which the Commission should disclose all the facts underlying its determination of said minimum prices and should substantiate the fixing of the said minimum prices and of the materially higher minimum prices for consumers in the State of New York, including the members of Associated Industries, than for their competitors in other states.

2) By order dated December 15, 1937, the Commission dismissed the said petition in so far as it sought a stay of the said minimum price orders Nos. 89 to 101, inclusive, and the said orders became effective December 16, 1937, and are now in effect.

II.

All the matters and things set forth in the said petition dated December 14, 1937, are relied on in support of this petition and, in addition, the following facts regarding typical members of Associated Industries, named parties hereto, are presented:

1) Carthage Paper Makers, Inc. is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at Carthage, N. Y. This company must and does purchase annually for the operation of its plant approximately 13,000 tons of 1¼" Nut and Slack bituminous coal. This coal is shipped by Ford Collieries Company, a code member, from its mines at Curtisville, Pa., and is purchased under written contract with the Carthage Coal Company, which company has applied to the Commission for registration as a wholesaler. Following issuance of the Commission's minimum price orders, the purchaser was notified that the price would be increased 36 cents per ton above that provided in the contract.

2) Utica and Mohawk Cotton Mills, Inc., is a corporation organized and existing under the laws of the State of New York, is a member of the Associated Industries, and has its plants at Utica, N. Y., and owns and operates as a subsidiary the Utica Willowvale Bleaching Company at Chadwicks, N. Y. This company must and does purchase annually for the opera-

tion of its plants approximately 12,000 tons of mine-run, low volatile, bituminous coal. Until December 16, 1937, it purchased such coal from the Benson Coal Company, which company has applied to the Commission for registration as a wholesaler, under a written contract entered into prior to April 26, 1937, the coal being shipped from Bakerton No. 3 at Elmora, Pa., the term of the contract being from March 31, 1937, until March 31, 1938, and the price provided in such contract is substantially below that required by the Commission's minimum price order. Since issuance by the Commission of its minimum price orders, the Benson Coal Company has advised this purchaser that it will make no deliveries of coal to the mills under said contract. The minimum price fixed by the Commission is 17 cents per ton more than the price provided in said contract. The supply of coal at the bleachery of this company is purchased from Earl G. Hauf and shipped from Sonman Run Mine at Sonman, Pa. This supply will last only until January 20, 1938, and before that date additional shipments of coal must be made. The price fixed on this coal is 4 cents per ton over the contract price.

3) Jamestown Veneer & Plywood Corporation is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at Jamestown, N. Y. This company must and does purchase annually for the operation of its plant approximately 1400 tons of bituminous coal. It has purchased and now purchases this coal under a written contract dated May 15, 1937, for 30 cars with Coal Hill Mining Company, Inc., which company has applied to the Commission for registration as a wholesaler, the coal being shipped from Wilson Mines, Pa. The Coal Company has advised the purchaser that

the price for coal under the contract would be increased to conform to the minimum prices issued by this Commission and under the outstanding orders the increase above the contract price is 40 cents per ton. The company had a supply of coal on hand as of January 1, 1938, sufficient only for 6 days and additional purchases must be made immediately.

4) Syracuse Chilled Plow Company, Inc. is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at Syracuse, N. Y. This company must and does purchase annually for the operation of its plant approximately 2500 tons of 5/8" Slack bituminous coal. It has purchased and does purchase this coal under written contract, entered into prior to April 26, 1937, with Mark A. Thompson Coal Company, which company has applied to the Commission for registration as a wholesaler, the term of the contract being from February 1, 1937, to April 1, 1938, and the coal being shipped from Pursglove Mine, Morgantown, W. Va. The price provided in the contract is 44 cents less than the minimum price fixed by the Commission and the Coal Company has advised the purchaser that under the Coal Commission's minimum price order the price would be increased in that amount. The company has a supply of coal on hand sufficient only for 6 weeks and before that time must purchase additional coal.

5) Oldbury Electro-Chemical Company is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at Niagara Falls, N. Y. This company must and does purchase annually for the operation of its plant approximately 10,000 tons of 1 1/8" Slack bituminous coal. This coal is purchased under a written

contract, entered into prior to April 26, 1937, with Pittsburgh Coal Company, a code member, the coal being shipped from Somers Mine, Pa., and the term of the contract being from April 1, 1937 until April 1, 1938. The price under the contract is 40 cents per ton less than the minimum price fixed by the Commission and the Coal Company has advised the purchaser that the price under the contract will be the price fixed by this Commission or 40 cents higher than the contract price.

6) Shenandoa Rayon Corporation is a corporation organized and existing under the laws of the State of Delaware, is a member of Associated Industries, and has its plant at Utica, N. Y. This company must and does purchase annually for the operation of its plant approximately 30,000 tons of Powdered Fuel (Adrian) bituminous coal. This coal has been and is now purchased under written contract with Rochester & Pittsburgh Coal Company, a code member, the coal being shipped from Adrian Mine, Adrian, Pa., and the term of the contract being from June, 1937 until June 1938. The Coal Company has advised the purchaser that the contract price, which is 23 cents per ton less than the minimum price fixed by the Commission, would be increased in the amount of 23 cents per ton. The company has a supply of coal on hand sufficient only for one month and before that time must purchase additional coal.

7) The Racquette River Paper Company is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at Potsdam, N. Y. This company must and does purchase annually for the operation of its plant approximately 18,000 tons of Pulverized bituminous coal. This coal is purchased under

written contract, entered into prior to April 26, 1937, with Rochester & Pittsburgh Coal Company, a code member, the coal being shipped from Adrian Mine, Indiana, Pa., and the term of the contract being from August 12, 1937 to August 11, 1938. The price of such coal provided in the contract is 23 cents per ton less than the minimum price fixed by the Commission. The Coal Company has advised the purchaser that effective December 16, 1937, the price would be increased in that amount. The Company has a supply of coal on hand sufficient only for 2 weeks and before that time must purchase additional coal.

8) Charles C. Kellogg & Sons Company is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at Utica, N. Y. This company must and does purchase annually for the operation of its plant approximately 300 tons of 1" and 2" Nut and Slack bituminous coal. This coal is purchased under written contract, entered into prior to April 26, 1937, with Hood Coal Company, which company has applied to the Commission for registration as a wholesaler, the coal being shipped from Pursglove Mine, and the term of the contract being from April 1, 1937 to April 1, 1938. The price of such coal provided in the contract is 35 cents per ton less than the minimum price fixed by the Commission. The Coal Company has advised the purchaser that under the Rules of this Commission the contract is cancelled as to prices and that the price would be increased to the minimum price fixed by the Commission. The company has a supply of coal on hand sufficient only for 6 weeks and before that time must purchase additional coal.

9) Gleason Works is a corporation organized and existing under the laws of the State of New York, is a

member of Associated Industries, and has its plant at Rochester, N. Y. This company must and does purchase annually for the operation of its plant approximately 7,000 tons of Stoker bituminous coal. This coal has been and is now purchased under written contract with Rochester & Pittsburgh Coal Company, a code member, the coal being shipped from Kent Mines, Kent, Pa., and the term of the contract being from June 17, 1937 to June 17, 1938. The price of such coal provided in the contract is 19 cents per ton less than the minimum price fixed by the Commission. The Coal Company has advised the purchaser that the price under the contract would be increased to the minimum price fixed by the Commission. The company has a supply of coal on hand sufficient only for five weeks and before that time must purchase additional coal.

10) Consolidated Car-Heating Company, Inc. is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at Albany, N. Y. This company must and does purchase annually for the operation of its plant 350 tons of Pea size Stoker bituminous coal. This coal has been purchased and is now purchased under written contract, entered into prior to April 26, 1937, with Marquette Coal Company, Inc., which company has applied to the Commission for registration as a wholesaler, the coal being shipped from Mine No. 8, Castle Shannon, Pa., and the term of the contract being from April 1, 1937 to March 31, 1938. The price of such coal provided in the contract is 16 cents per ton less than the minimum price fixed by the Commission. The Coal Company has advised the purchaser that effective December 16, 1937, the price would be increased to the minimum fixed by the Commission.

The company has a supply of coal on hand sufficient only for three weeks and before that time must purchase additional coal.

11) Duffy Mott Company, Inc. is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plants at Holley, Hamlin, Ravena, and Voorheesville, N. Y. This company must and does purchase annually for the operation of its plant between 2,000 and 3,000 tons of 2" x 4" Egg bituminous coal. This coal has been purchased and is now purchased under written contract with Coal Hill Mining Company, which company has applied to the Commission for registration as a wholesaler, the coal being shipped from the Byrne and Wilson Mines, the contract being for a period of one year. The price of such coal provided in the contract is 55 cents per ton less than the minimum price fixed by the Commission. The Coal Company has advised the purchaser that effective December 16, 1937, the price under the contract would be increased 55 cents per ton. The company has a supply of coal on hand sufficient until January 31, 1938, and before that time must purchase additional coal.

12) Fort Schuyler Knitting Company, is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and operates its plant at Utica, N. Y. This company must and does purchase annually for the operation of its plant approximately 1,000 tons of Mine Run bituminous coal. This coal is purchased under written contract, entered into prior to April 26, 1937, with Benson Coal Company, which company has applied to the Commission for registration as a wholesaler, the coal being shipped from Bakerton No. 3 Mine, Spangler, Pa., and

the term of the contract being from April 1, 1937 to July 1, 1938. The price for such coal provided in the contract is 15 cents per ton less than the minimum price authorized by the Commission. The Coal Company has advised the purchaser that effective December 16, 1937, all contracts became null and void. The company has a supply of coal on hand sufficient for only two weeks and before that time must purchase additional coal.

13) Larkin Company, Inc. is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at Buffalo, N. Y. This company must and does purchase annually for the operation of its plant between 15,000 and 18,000 tons of Stoker's Prepared Bituminous Coal, size 1" x 2" and $\frac{3}{4}$ " x 2". This coal is purchased under written contract, entered into prior to April 26, 1937, with United Eastern Sales Corporation, which company has applied to the Commission for registration as a wholesaler, and Pittsburgh Coal Company, a code member, the coal being shipped from mines at Ernest, Indiana, Pa., and Ocean, Allegheny County, Pa., the terms covered by the contracts being from April 1, 1937 to March 31, 1938 and from March 31, 1937 to April 1, 1938. The prices provided in the contracts are 40 cents per ton less than the minimum prices fixed by the Commission and the coal company has advised the purchaser that the price under the contract would be increased 40 cents. The company has a supply of coal on hand sufficient only for one month and before that time must purchase additional coal.

14) Little Falls Manufacturing Company is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries and has its plant at Little Falls, N. Y. This com-

pany must and does purchase annually approximately 1250 tons of Belmont 2" Nut and Slack bituminous coal. This coal is purchased under written contract entered into prior to April 26, 1937 with Mark A. Thompson Coal Company, which company has applied to the Commission for registration as a wholesaler, the coal being shipped from Pursglove, Mine No. 5, W. Va., the term of the contract being from April 1, 1937 to April 1, 1938. The price under the contract is 50 cents per ton less than the minimum price fixed by the Commission and the coal company has advised the purchaser that effective December 16, 1937, the price would be increased 50 cents. The company has a supply of coal on hand sufficient only for 6 weeks and before that time must purchase additional coal.

15) General Plastics, Inc., is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at North Tonawanda, N. Y. This company must and does purchase annually approximately 4,000 tons of 2" Nut and Slack bituminous coal. Approximately 50 per cent of this coal is purchased under written contract with Pittsburgh Coal Company, a code member, the coal being shipped from the mines at Champion, Pa., and the term of the contract being from June 17, 1937, to June 17, 1938. The price of such coal provided in the contract is 28 cents per ton less than the minimum price fixed by the Commission. The Coal Company has advised the purchaser that the price under the contract would be increased 28 cents per ton "effective December 16, 1937, in accordance with the minimum fair market prices established by the National Bituminous Coal Commission under a law known as the Bituminous Coal Act of 1937." The company has a supply of coal on

hand sufficient only for eight to ten weeks and before that time must purchase additional coal.

16) Comstock Canning Corporation is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries and has its plant at Newark, N. Y. This company must and does purchase annually for the operation of its plant approximately 4,500 tons of bituminous coal. Twenty per cent of this coal has been and is purchased under written contract with Pittsburgh Coal Company, a code member, the coal being shipped from Mines at Belle Vernon, Pa., and the term of the contract being from June 1, 1937, to June 17, 1938. The price of such coal provided in the contract is 35 cents per ton less than the minimum prices fixed by the Commission. The Coal Company has advised the purchaser that the contract is repudiated as to the price provided therein. The company has a supply of coal on hand sufficient only to March 1, 1938, and before that time must purchase additional coal.

17) Lockport Cotton Batting Company is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries and has its plant at Lockport, N. Y. This company must and does purchase annually for the operation of its plant approximately 2400 tons of 2" Nut and Slack bituminous coal. Ninety-five per cent of this coal is purchased under written contract with Valley Camp Coal Company, a code member, the coal being shipped from Mobley Mine, W. Va., and the term of the contract being from September 1, 1937 to September 1, 1938. The price of such coal provided in the contracts is 36 cents per ton less than the minimum price fixed by the Commission. The Coal Company has advised the pur-

chaser that a 36-cent per ton increase is effective under the contract December 16, 1937.

18) S. A. Cook & Company, is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries and has its plant at Medina, N. Y. This company must and does purchase annually for the operation of its plant approximately 1500 tons of 1½" x 2" stove bituminous coal. Eighty per cent of this coal is purchased under written contract with Pittsburgh Coal Company, a code member, the coal being shipped from Mines at Champion, Pa., and the term of the contract being from June 2, 1937 to June 2, 1938. The price of such coal provided in the contract is 35 cents per ton less than the minimum price fixed by the Commission. The Coal Company has advised the purchaser that effective December 16, 1937, the price under the contract will be increased 35 cents per ton. The company has a supply of coal on hand sufficient only for five weeks and before that time must purchase additional coal.

19) Richardson Corporation, is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plant at Rochester, N. Y. The company must and does purchase annually for the operation of its plant approximately 1200 tons of 1¼" Nut and Slack bituminous coal. Ninety per cent of this coal is purchased under written contract, entered into prior to April 26, 1937, with Ford Collieries Company, a code member, the coal being shipped from Deer Creek Mines, Curtisville, Pa., and the term of the contract being from April 1, 1937 to May 31, 1938. The price of such coal provided in the contract is 32 cents per ton less than the minimum price ordered by the Commission. The

Coal Company has advised the purchaser that the price provided in the contract is repudiated under regulations under the Bituminous Coal Act of 1937 and that the price would be increased 32 cents per ton. The company has a supply of coal on hand sufficient only for three weeks and before that time must purchase additional coal.

20) Hooker Electrochemical Company is a corporation organized and existing under the laws of the State of New York, is a member of Associated Industries, and has its plants at Niagara Falls, N. Y. This company must and does purchase annually for the operation of its plant approximately 50,000 tons of Mine Run and Nut Slack bituminous coal and 5,000 tons of 1½" x 4" Egg bituminous coal. Ninety per cent of this coal has been and is purchased under written contract, entered into prior to April 26, 1937, with Christopher Mining Company and Arkwright Coal Company, code members, the coal being shipped from Robinson Run, Byrne and Mona Mines, and the term of the contract being from April 10, 1936 to January 1, 1941. The price of such coal provided in the contract is 47 cents per ton less than the minimum prices fixed by the Commission. The Coal Company have advised the purchaser that the prices under the contract are no longer in effect and that the minimum prices fixed by the Commission will be charged. The company has a supply of coal on hand sufficient only for two months and before that time must purchase additional coal.

21) The minimum prices fixed in the Commission's said orders Nos. 89 to 101, inclusive, for mine run coal, when for sale to consumers in the State of New York, including the above named members and other members of Associated Industries, are in many instances sub-

stantially in excess of the weighted average of the total cost per net ton of the tonnage, as announced by this Commission, of Minimum Price Area 1, and of the districts embraced therein, the minimum prices for the members named herein being as high as \$2.30, \$2.45 and \$2.55 per net ton.

22) Many contracts of members of Associated Industries provide that the prices therein shall be subject to change by valid minimum price orders of the National Bituminous Coal Commission.

23) The coal selling companies named in the preceding paragraphs, other than code members, purchase coal for sale in carload lots to consumers located in New York State, including members of Associated Industries, from code members with mines in districts numbered 1 to 13 in Minimum Price Area 1.

24) The information set forth in the preceding paragraphs was supplied by the member companies named to Mark A. Daly, General Secretary of Associated Industries, the individual paragraph was checked and its correctness confirmed by telegraph by the company concerned, and the information set forth is representative of similar information supplied to him by several hundred members of Associated Industries having plants located throughout the State of New York. It is not deemed necessary to include herein the particulars regarding contracts of additional companies which could be shown to the Commission. The shortness of time within which petition for reconsideration must be filed does not permit the submission to the Commission of affidavits by individual companies, which affidavits, however, can be filed on short notice if desired.

III.

The Commission should reverse its order herein dated December 15, 1937, dismissing the petition on behalf of Associated Industries of New York State and its members praying a stay of the Commission's orders Nos. 89 to 101, inclusive, fixing minimum prices of coal of Code members produced in Districts Nos. 1 to 13, inclusive, when for sale in the State of New York, and should now suspend the effectiveness of the said price orders, in so far as they apply to coal for sale in the State of New York, until after the Commission shall have given reasonable public notice of hearing regarding the prices therein, shall have held a hearing at which all interested parties are afforded an opportunity to be heard, shall have disclosed in such record all relevant facts underlying and substantiating the minimum prices fixed, including the coordination of prices in such a manner as to fix higher minimum prices when for sale in the State of New York than for sale in neighboring states, and shall have made the findings of fact specified in the Act justifying and sustaining the minimum prices fixed and their coordination; and as grounds requiring such suspension the following are respectfully presented:

1) The Commission's orders Nos. 89 to 101, inclusive, in fixing the minimum prices below which the Act prohibits a coal producer from selling except under penalty of exclusion from the Code, with resulting prohibitive taxes as provided in Section 3(b) and Section 5(b)(c), are rules and regulations having the force and effect of law which the Act provides shall not be made or prescribed by the Commission unless the Commission shall have given reasonable public notice of a hearing, and unless it shall have afforded to interested par-

ties an opportunity to be heard and unless it shall have made findings of fact. (Section 2(a)) The minimum price orders Nos. 89 to 101, inclusive, were made without any hearing and without any notice of hearing thereon. They were made without affording Consumers' Counsel, Associated Industries of New York, its members, or any interested party an opportunity to examine the facts underlying the Commission's minimum prices, or the coordination thereof, and without any factual substantiation thereof by the Commission. The orders are unsupported by findings of fact disclosing the costs of production under Section 4, Part II, subsection (a) of the Act, or the elements thereof, or whether the minimum prices will reduce or increase the return per net ton upon all the coal produced in any district below or above the minimum return as provided in subsection (a) of Part II, Section 4, by an amount greater than necessary to accomplish the coordination provided for by subsection (b) of Part II. The orders were made without any proceedings, without any hearings, and no public record in any proceeding contains any evidence in support thereof.

2) The said minimum price orders so made can at the most be considered no more than tentative or proposed orders which the Commission by the Act was and is required and bound to suspend and which it was without power to make effective or to continue in effect, there having been filed with the Commission a protest and complaint of dissatisfaction against such minimum prices contained in said price orders by Consumers' Counsel on behalf of Associated Industries of New York State and its members on December 14, 1937, prior to the effective date provided in such orders. (Sec. 4, Part II (d); Sec. 2. (a))

(3) The Commission by its Marketing Rules and Regulations, Incidental to the Sale and Distribution of Coals of Code Members within District Numbers 1 to 13, inclusive, effective December 16, 1937, by order No. 88 of the Commission made November 29, 1937, pursuant to Section 4, Part II, subsection (h), effectively regulates all carlot distributors of coals produced by code members and prevents them, under penalty of having to cease doing such business, from charging less than the prices provided in the Commission's minimum price orders, including orders Nos. 89 to 101, inclusive, the said Marketing Rules and Regulations providing:

"A 'Wholesaler' is a person who purchases coal for resale and who resells such coal in lots of not less than a cargo or railroad carload, without physically handling such coal." (Section I)

"From and after the date hereinafter provided no code member or sales agent of a code member shall pay or allow any discount from minimum or other prices to any wholesaler as herein defined unless such wholesaler shall be registered with the Coal Commission at the time of the sale.

"Wholesalers of coal desiring to qualify themselves so as to be entitled to receive from code members or their sales agents discounts from minimum prices established by the Coal Commission shall make application to be designated as Registered Wholesalers." (Section III)

"Each such application shall be accompanied by the following agreement, executed in duplicate and properly signed and acknowledged on behalf of applicant.

'Terms of Registration'

"The undersigned wholesaler agrees upon being registered as a 'Registered Wholesaler' by the Coal Commission and thereby becoming entitled to discounts authorized by the Coal Commission:

“(1) Not to sell, deliver, resell or offer for sale any coal at a price less than the minimum price nor greater than the maximum price established by the Coal Commission for such coal and in effect on the date of delivery.” (Section III)

“The registration of any such wholesaler, may be suspended by the Coal Commission after hearing, held upon twenty (20) days written notice by mail to the wholesaler, and upon proof of failure or refusal to comply with any duty or requirement imposed upon the wholesaler by reason of his registration with the Coal Commission, the registration of the offending wholesaler may be suspended for such period of time as the Coal Commission in its discretion may deem proper.” (Section III)

(4) That the Commission alone has the authority to obtain and assemble the information upon which the minimum prices under the Act must be based and the Commission alone is possessed of the facts upon which the minimum prices in the orders Nos. 89 to 101, inclusive, were based, and the Commission, by its order No. 111, made December 7, 1937, prescribing rules of procedure under Section 4, Part II, subsection (d), has barred effective complaint under that section so long as the Commission continues in force the said minimum price orders and persists in its failure and refusal to make findings of fact and fails and refuses to introduce in evidence in a public proceeding the facts underlying and substantiating the minimum prices fixed in the said price orders. Order No. 111 provides that in any proceeding upon complaint under Section 4, Part II, subsection (d) “any minimum price or Marketing Rule and Regulation complained of, shall be presumed to have been established and prescribed in conformity with the provisions of the Act, and the burden of proof shall be upon the party so complaining.”

(5) The Commission in making the said minimum price orders operative December 16, 1937, and in allowing the said minimum price orders to continue in force with the effect of nullifying and modifying outstanding contracts of members of Associated Industries of New York State, including those members named herein, by requiring that higher prices than provided therein must be charged by coal producers and wholesalers parties thereto to escape the prohibitive penalties provided in the Act and in the Commission's Marketing Rules and Regulations, did and does deprive members of Associated Industries of New York State of their liberty to make normal and usual business contracts and of their property without due process of law in violation of the Fifth Amendment to the Federal Constitution.

Respectfully submitted,

(Sgd.) JOHN CARSON,
CONSUMERS' COUNSEL.

State of New York, County of New York, ss:

MARK A. DALY, being duly sworn, deposes and says that he is General Secretary of Associated Industries of New York State, Inc.; that he received from the member companies named in the above petition the information set forth; that he has also received several hundred memoranda of similar information from other member companies; that to the best of his knowledge and belief each of the statements included in the petition is a true statement of fact.

(Signed) MARK A. DALY.

Subscribed and sworn to before me this 11th day of January, 1938.

(Seal)

OLGA M. MENAPACE,
Notary Public.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED FEB 19 1938

IN THE

Joseph W. Stewart

United States Court of Appeals ^{CLERK}

FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1938.

No. 7109.

JOHN CARSON, ASSOCIATED INDUSTRIES OF NEW YORK
STATE, INC., *et al.*,

against

NATIONAL BITUMINOUS COAL COMMISSION.

**MEMORANDUM IN OPPOSITION TO MOTION TO
DISMISS.**

This petition was filed under Section 6(b) of the Bituminous Coal Act of 1937 to review an order of the National Bituminous Coal Commission dated December 15, 1937, which order dismissed a petition alleging dissatisfaction with the proposed minimum prices for coal and seeking a hearing under Section 2(a) of the

National Bituminous Coal Act and a suspension of the price orders pending such hearing. The effect of the denial was to permit the prices to become effective December 16, 1937, without hearing.

This petition was duly filed within sixty days from the entry of said order, and the facts and points of law relied upon were presented to the Coal Commission, the facts being submitted under oath.

It is the position of your petitioner that upon the filing of the petition under Section 6(b) the Coal Commission was bound and required by the terms of the Act, by the constitutional principles governing the exercise of delegated legislative power, and by the requirements of due process, to suspend the effectiveness of the said minimum price orders, and this Honorable Court is asked to modify the order accordingly.

Your petitioners were hopeful that upon the entry of an order by this Honorable Court under date of February 10, 1938, suspending the prices fixed by the Commission on railroad fuel on the ground that no hearing had been had thereon, the Commission would immediately suspend all price orders. This was its clear duty under the circumstances, as the underlying facts are essentially the same. But on the contrary the Commission issued a public notice in which it announced that it would take no such action. Nor, so far as your petitioners are advised, has any appeal been taken from the decision of this Court.

We shall discuss briefly *seriatim* the points relied upon by the respondent in its motion to dismiss. These points are in large part the same as those which this Honorable Court found insufficient to justify the denial of a stay *pendente lite* in its decision of February 10, 1938, in No. 7100, the *Saxton Coal Mining Case*.

Respondent's Point 1: "The basic price orders issued by the Commission on November 30, 1937, are not directly reviewable under Section 6 (b) of the Act, and this Court has no jurisdiction to review such orders on the petition herein."

A distinction should be drawn between the basic price orders which were dated November 30, 1937, and the order of which review is here sought dated December 15, 1937. The latter order was entered in a proceeding known as No. 107-FD (FD stands for Formal Docket) in which petitioners were parties. It is a final "dismissal" and "denial" order. The parties to the proceeding have the affirmative right under the expressed terms of Section 6(b) to a review of that order. This is true whether or not the basic price orders are directly reviewable under Section 6(b). The only order to be reviewed here is the order refusing to suspend the operation of the minimum prices. The motion to dismiss admits *sub silentio* that the order herein sought to be reviewed is directly reviewable under Section 6(b) of the Act. Quite obviously the decision here as to the validity of the order refusing to suspend requires an indirect review of the basic price orders. It is commonplace in the law that the validity of an order of an administrative agency of Congress may be controlled by the validity of the basis upon which it rests. It may rest on a statute which is invalid or upon rulings of law made by the Commission which are not in conformity with accepted legal principles, or it may rest on previously issued orders which are in themselves void. If the basis itself is invalid it follows *a fortiori* that administrative action based thereon can not be valid. To place the basic price orders beyond the consideration of the Court would

require it automatically to stamp as valid a subsequent order supported by an invalid basis. Such a contention is all the more lacking in cogency in this proceeding because of the Commission's reasoning, namely, that the basic price orders were not predicated on any evidence offered at any hearing in any proceeding and, therefore, there are no parties to any proceeding who may under the terms of Section 6(b) file a petition for a direct review! If there was no hearing, there could be no parties, and since petitioners were not parties they have no statutory right to appeal! Such seems to be the gist of the argument. The Court will not be inclined to let the Commission take advantage of the fact that it held no hearings to which anyone could become a party.

Respondent's Point No. 2: "In any event the petition herein, in so far as it seeks to suspend the basic price orders issued November 30, 1937, was not filed within the 60-day period prescribed by Section 6(b) of the Act, and therefore this Court has no jurisdiction to review the said orders."

This point is inconsistent with Point No. 1. In the first point respondent contends that Section 6(b) does not apply to the basic price orders. In the second point it is contended that the 60-day limitation provided in Section 6(b) does apply. If Section 6(b) applies to the basic price orders the 60-day limitation also applies but there is no possibility of applying the 60-day limitation unless the price orders are directly reviewable under that section. The 60-day limitation operates only as to orders covered by Section 6(b).

The jurisdiction of this Court on the present petition does not depend upon whether the minimum price

orders are or are not directly reviewable. The order to be reviewed is the one entered in Docket No. 107 on December 15, 1937, dismissing and denying the petition for suspension of the minimum prices. This petition was filed with the Court on February 11, 1938, within sixty days from the entry of that order.

Since the order here sought to be reviewed was entered on December 15, 1937, and since the petition herein was filed within sixty days from that date, it is quite immaterial that the orders fixing the basic prices was entered earlier.

Respondent's Point 3: "The petitioners have no such legal interests as entitle them to bring this action and are not 'persons aggrieved' within the meaning of Section 6(b) of the Act."

A person who has been denied statutory and constitutional rights by an order entered in a proceeding to which he is a party is plainly an "aggrieved person" under Section 6(b) of the Coal Act. There are twenty individual companies petitioners here, representative and typical of the 1,462 members of Associated Industries of New York State located throughout the State of New York and of consumers generally as a class, who have been denied by an order in a proceeding to which they are parties their statutory and constitutional rights not to be deprived of their liberty of contract and of their property in existing contracts without the minimal requirement of a hearing.

Consumers' Counsel is charged by the Coal Act with the duty of appearing in proceedings before the Coal Commission and of safeguarding the administration of that Act. (Section 2(b)) As to an order made in a proceeding to which he is a party which he deems

invalid and violative of the statutory and constitutional rights of the consuming public generally and of individual members thereof Consumers' Counsel, representing the public and the members thereof, is an "aggrieved person" under Section 6(b). He is the statutory spokesman for the aggrieved public. He is the designated guardian of consumers' rights. The very duties and definition of his office make him an aggrieved person when he appears to protect the public against the arbitrary or unlawful exercise of power by the Commission. There is not involved in the present proceeding any question as to whether there is presented a "case" or "controversy" under Section 2, Article III of the Constitution. Consumers' Counsel in the present petition is joined by individual companies whose legal rights have been violated, making the proceeding a case and controversy to which the judicial power of the United States extends.

Associated Industries of New York State is a corporate association of 1,462 manufacturing concerns located throughout the State of New York with investments totaling \$4,000,000,000 and employing between 600,000 and 700,000 of the 1,200,000 persons normally employed in factories in the State of New York. Representing its members in a representative capacity as a party to a proceeding before the Coal Commission instituted for and on behalf of its members by Consumers' Counsel, Associated Industries is also an "aggrieved person" under Section 6(b).

The right of judicial review granted by Section 6(b) is not limited to those authorized to institute proceedings before the Coal Commission or to those who are named as defendants or coal producers in orders of the Commission. Had such a limitation been the pur-

pose of Congress it would not have employed the language used in Section 6(b) but would have made this limitation clear. For illustration, in Section 4, Part II, Subsection (d), and in Section 15 the Act defines by limitation the few who may by complaint as of right on their own motion institute proceedings before the Commission. An equally delimited list would have been employed in Section 6(b) had it been the purpose of Congress to bar other parties to a proceeding from a review of the orders made therein. But Section 6(b), in sharp contrast with the complaint sections, grants the right of review to "any person" aggrieved by an order made in a proceeding "to which such person is a party." Congress obviously did not intend to exclude from the right of judicial review an intervener in a proceeding before the Commission, or to exclude any other party thereto such as the real party or parties in interest named in a complaint filed in a representative capacity by Consumers' Counsel, a state or city, or a district board for such real party or parties in interest.

If Section 6(b) were to be construed as precluding petitions for review by parties other than complainants or defendants and if the grant of review were further limited to parties able to show legal damage, the result would be anomalous. The right to petition for review under such limitations would vest in individual coal producers only, except that states and subdivisions thereof might petition as to coal consumed by them in their governmental capacity. Orders violative of the interest of the consuming public and the members thereof could never be reviewed. This is an inconceivable interpretation of a statute in which Congress has so plainly manifested its concern for the

interest of the consuming public as to create a special office in charge of a Consumers' Counsel charged with the duty of safeguarding that interest. Had Congress intended that the right of appeal by petition for review should be limited to coal producers and to states and cities as to orders involving coal purchased for their own use, simple language would have made this clear.

An analogy may be found in the practice under the Urgent Deficiencies Act (U. S. Code, Title 28, Section 41(29)). That Act, under which suits are brought to enjoin and annul orders of the Interstate Commerce Commission, does not in terms authorize "any party" to a proceeding in which an order is made to bring a suit. In fact, that Act does not specify who may bring such a suit. Generally Section 6(b) offers a method and scope of review substantially different from that provided in the Urgent Deficiencies Act. Under the latter Act an order of the Interstate Commerce Commission must be either annulled or sustained. The court has no power thereunder to "*modify*" the order of the Interstate Commerce Commission to make it conform to law, whereas this power does exist under Section 6(b) as to orders of the Coal Commission. The court review under the Coal Act is a *broad, supervisory character*. The provision in Section 6(b) of the Coal Act for petition to review by any party to the proceeding before the Coal Commission further basically distinguishes the two procedures. Another fundamental difference is that appeal lies directly to the Supreme Court in suits brought to annul orders of the Interstate Commerce Commission, whereas under Section 6(b) no such right exists, the right of appeal being limited to petitioning the Supreme Court for a writ of certiorari. These distinguishing characteristics clearly

evidence the intent of Congress to provide for parties to proceedings before the Coal Commission *a broader and more liberal method of appeal* on questions of law than exists as to orders of the Interstate Commerce Commission.

Fortunately we have in a decision of this court a good illustration of an order which would not have been reviewable if made by the Interstate Commerce Commission but which this Court held to be reviewable under a statute authorizing an "aggrieved person" to appeal. In *Sykes v. Jenny Wrenn Co.*, 64 App. D. C. 379, it was held that a radio station was a person "aggrieved" and might appeal to this Court from an order of the Federal Communications Commission denying petition to intervene in a proceeding involving the application of a competing station to increase its hours of broadcasting. The injury alleged was that which would result from increased competition. The Commission by denying the petition to intervene had denied the company the opportunity to be heard.

The present petition for review is maintainable, however, even under the narrower principles governing suits against orders of the Interstate Commerce Commission. The case most directly in point is *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476, which involved a *minimum* rate order of the Commission requiring the railroads to charge not less than prescribed rates. (The minimum price orders for coals of code members are exactly analogous.) The order was not made upon complaint but in a suspension proceeding instituted by the Commission. The railroads against which the order ran acquiesced in it, but shippers who had participated in the proceeding before the Commission filed suit to annul the order. These ship-

pers were unable to allege any contractual or legal right in the lower rates formerly existing. (Petitioners here have contractual rights to coal prices lower than the minimum prices fixed by the Coal Commission) It was contended that the shippers had no standing to maintain the suit to review the minimum rate order. The Supreme Court in a unanimous opinion, speaking through Mr. Justice Roberts, overruled this contention, saying (479):

“The appellants were entitled to bring and maintain this suit to set aside the order. They were parties to the proceeding before the Commission, had a pecuniary interest in the rates and were affected by the order.”

Similar to the *Youngstown Case* was the later decision in *United States v. American S. & T. Plate Co.*, 301 U. S. 402, which was a suit brought by shippers to annul orders of the Interstate Commerce Commission made in a general investigation instituted by the Commission on its own motion. The orders in issue directed the railroads serving the plants of five industrial concerns to cease rendering certain terminal services and to refrain from granting allowances to those concerns for certain services which the industries were performing. The suit was held maintainable by these industrial concerns although it does not appear that they were parties to the proceeding before the Commission. The Court said (404):

“The appellees are five industrial concerns affected by the orders.”

Skinner & Eddy Corp. v. United States, 249 U. S. 557, was a suit brought and maintained by a shipper to enjoin an order of the Interstate Commerce Com-

mission authorizing railroads to increase certain rates which had been maintained under Fourth Section orders of the Interstate Commerce Commission. The Interstate Commerce Act provided that such reduced rates, made to meet water competition, may not be increased except upon changed conditions other than the elimination of water competition. The increased rate established under the permissive order of the Interstate Commerce Commission was 75 cents. It was contended that plaintiff had no right to maintain the court suit and was limited to his remedy before the Commission. The Court, speaking through Mr. Justice Brandeis, held that the suit was maintainable without resort to any administrative relief before the Commission, saying (562):

“But plaintiff does not contend that 75 cents is an unreasonably high rate, nor that it is discriminatory, or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. *In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order even if the plaintiff has not attempted to secure redress in a proceeding before the Commission.*” (Italics ours)

Western Paper Makers Chemical Co. v. United States, 271 U. S. 268, was a similar suit brought and maintained by shippers who had participated in a suspension proceeding by the Interstate Commerce Commission. The legal interest of the shipper complainants in that proceeding was that they were a part of the general public affected by the increased rates which the Commission authorized.

A case not unlike the case at bar is *United States v. New River Co.*, 265 U. S. 533, brought by shipper coal

companies to annul an order of the Commission permitting and authorizing the railroads to establish a particular rule to govern the distribution of coal cars for loading. It was held that a suit was maintainable by the shippers although the order was merely permissive. The Court, speaking through Mr. Justice Butler, said (541):

“When the case was reopened before the Commission, the contest was between the operators of local mines, attacking the 150 per cent rule and the operators of joint mines, supporting that rule and objecting to rule 4. The Commission reversed its former findings and decided in favor of rule 4 and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. It is not merely negative. Clearly the order permits and authorizes the carriers to apply rule 4. *If that rule is illegal, as alleged, such permission and authority will not sustain it, and suit will lie to set it aside.*” (Italics ours)

The Coal Commission, by refusing to suspend its minimum price orders, allowed the said minimum prices to go into effect and required coal producers to charge not less than the prices provided therein. If such minimum price orders were illegal, as alleged, the refusal of the Commission to suspend must be reversed and under the express terms of the statute an appeal will lie to modify the order of dismissal accordingly.

United States v. Berwind-White Coal Min. Co., 274 U. S. 564 was a suit brought to annul an order of the Interstate Commerce Commission establishing rules governing the distribution of cars among bituminous coal mines in times of car shortage. “Some of the plaintiffs are operators of coal mines, some distributors

of coal, some large private consumers of coal, and some are railroads. All had been parties to the proceeding before the Commission in which the order was entered." (P. 567) The primary ground of attack was the same as that presented in the present suit, namely, that the Commission had exceeded the powers conferred by Congress. It will be noted that the parties plaintiff were not only the railroads, but others having a direct interest in or directly affected by the order in question.

This Court in its opinion dated February 10, 1938, in *Saxton Coal Mining Co. v. National Bituminous Coal Commission*, No. 7100 and associated cases, referred to the decision of the Supreme Court in *Edward Hines Trustees v. United States*, 263 U. S. 143 and *Sprunt & Son v. United States*, 281 U. S. 249. The first of these was a suit brought by a lumber shipper to annul an order of the Commission requiring the railroads to cancel a penalty charge of \$10.00 per car which did not directly affect him but which had previously been assessed against his competitors. The case did not involve any claim by the plaintiff of a right to be heard or any right to a hearing. The Court held that there was no right in the plaintiff to have penalty charges assessed against his competitors and that the plaintiff's right was limited to protection against unjust discrimination which the Commission by its finding had negatived. The Court said (148):

"Cancellation of a charge by which plaintiff's rivals in business have been relieved of the handicap heretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition but plaintiffs have no absolute right to require carriers to impose penalty charges."

Unlike the orders involved in the *Youngstown, American Sheet & Tube* and *New River* cases, the order in *Edward Hines Trustees v. United States* did not directly affect the rights of the plaintiff in its shipper relation to the railroads. Bluntly speaking, the plaintiff tried to prove a legal interest by showing that it would be to his advantage to have his competitors penalized. The court thought that this was, at best, a very indirect interest. A person is clearly not entitled as of right to have a preference continued in his favor. In none of the cases brought by shippers to annul orders which *affected their own charges or rights as shippers* has it been held that the suit could not be maintained.

Sprunt & Son v. United States can have no application in the present proceeding because here petitioners possess independent statutory and constitutional rights which were violated by the order sought to be reviewed. No such independent rights were possessed by the plaintiff in the *Sprunt* case. The Court pointed out therein that the situation confronting the plaintiff was not solely due to the order entered by the Commission but flowed from the action of the railroads in equalizing his rates and those of his competitor, and that notwithstanding the existence of an order by the Interstate Commerce Commission requiring this equalization the position of the plaintiff was the same as if no order had been issued. The railroads by not joining in the appeal and by acquiescing in the order had placed the plaintiff in a position where his real complaint was against the railroads and not against the Commission's order. The Court said that the plaintiff's only remedy against such carrier action was complaint to the Commission charging unreasonable or unlawful rates. The annulment by the Court of the Com-

mission's order would not have changed the position of the plaintiff or granted him any relief against the rate adjustment which had, so far as the record appeared, been due to carrier action and not to Commission action.

It must be apparent that in the *Hines case* the plaintiff tried to build up a right out of his alleged interest in penalizing his rivals, and that in the *Sprunt case* the plaintiff's real grievance was not so much against the Commission's order as against the railroads, which acquiesced in the order and were voluntarily observing it. To set aside the order might well have been a vain thing because apparently the railroads would continue to maintain the rate adjustment against which the shipper was complaining. Here, on the contrary, a setting aside of the price orders will give immediate and needed relief to parties now before the Court and who are actually paying the higher coal prices, and whose outstanding contracts have been virtually nullified. In the *Hines case* the plaintiff could have appealed to the Interstate Commerce Commission to remove the discrimination. The case at bar, however, is not a case in which relief is to be obtained by administrative action, but involves the statutory and constitutional right to a hearing which the administrative agency has flatly denied, and in which denial it persists even after this Honorable Court in a directly analogous case has recently granted relief. And while it has come to be more or less axiomatic among lawyers that the *Sprunt case* presents difficulties, and can not easily be reconciled with other decisions of the same court, it is probably safe to say that the decision in that case is not intended to go beyond the peculiar facts there found to exist; and this view is supported

by the fact that other decisions of the court, both earlier and later, seem to reach a contrary conclusion. This is particularly true of the *Youngstown Sheet & Tube case* in which the Supreme Court in rather broad language sustained the right of appeal in one who was a party below and who had no contractual right in the lower rates but who was "affected" in the sense that he had a pecuniary interest in the rates.

In his petition dated December 14, 1937, in Docket No. 107-FD, Consumers' Counsel joined with him, Associated Industries of New York State, Inc., and filed a petition in his representative capacity on behalf of its members. Associated Industries and its members were the real parties in interest. The petition was sworn to by the Secretary of Associated Industries. It can not be said that the real parties in interest in a proceeding named therein are not parties thereto. The twenty individual companies petitioners here are members of Associated Industries and are named as the real parties in interest in the record in the said proceeding. The relevant facts regarding their membership in Associated Industries, their corporate status, and the facts regarding their contracts for coal and the effect of the minimum prices upon them were submitted to the Commission under oath in the supplemental petition in Docket No. 107-FD.

The twenty companies named are *typical* members of Associated Industries and typical consumers of coal in New York State and in their representative capacity have presented to the Commission and to this Honorable Court a question which "is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court." *Equity Rule No. 38*. It would

not be practicable to bring before the court all the consumers of coal in the State of New York. The petition before the Commission, made under oath, stated that "the information set forth is representative of similar information . . . supplied by several hundred members of Associated Industries having plants located throughout the State of New York." (Petition, p. 33).

Under Equity Rule No. 38, when parties are numerous, or if the question is one of general interest, and only a few may sue for the many, or when the parties from a voluntary association fairly represent the interests of all, the court will permit the few to sue for the many. This rule is valid, and binds all parties within the jurisdiction. *Supreme Tribe, Ben Hur v. Cauble*, 255 U. S. 356; Simkins Federal Practice, Revised Edition; p. 469, section 509.

Respondent's Point 4: "This Court has no jurisdiction to entertain or determine an appeal by the Consumers' Counsel, an office of the Department of the Interior, from an order of the National Bituminous Coal Commission, likewise an office of the Department of the Interior, involving only a dispute between two agencies of a single executive department of the Government as to the proper administration of the statute which they were created to administer."

Congress by Section 4, Part II, Subsection (d) and by Section 15 grants to Consumers' Counsel "the right" to institute by complaint proceedings before the Coal Commission. The complainant instituting as of right a proceeding before the Commission is obviously a "party" to that proceeding. Congress could not have

more clearly authorized the Consumers' Counsel to appeal from an order entered in a proceeding instituted by him than by the language of Section 6(b) which authorizes any person a party thereto to take such an appeal. Had it been the purpose of Congress to deny to Consumers' Counsel the right to appeal this would have been done by limiting the phrase "any person" and by amending the first part of Section 6(b) to read: "Any person, *other than Consumers' Counsel*, aggrieved by order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States . . ."

Respondent's Point No. 4 will be more fully discussed by memorandum in opposition to the motion filed by counsel for Consumers' Counsel.

Respondent's Point 5: "The Consumers' Counsel is not authorized by the Act to represent individual consumers."

The effect of this point is to render completely ineffectual the office of Consumers' Counsel and to make it impossible for him to perform the duties with which he is charged by the National Bituminous Coal Act of 1937. This may be deemed "a consummation devoutly to be desired." Unless Consumers' Counsel is able in proceedings before the Commission to join with him individuals suffering legal injury from the rulings and prices fixed by the Commission, it may be that the Commission can avoid judicial review of all orders affecting the consuming public. There is some question whether Consumers' Counsel can present on appeal a "case" or "controversy" under the Constitution unless he is able to join with him representative

members of the consuming public whose interests are affected and thereby bring the appeal within the judicial power of the United States. It lies within the discretion of Consumers' Counsel as to the best means of protecting the public interest. It is difficult to conceive of Consumers' Counsel representing the consuming public in the abstract. The interest of the consuming public is the interest of the members thereof. Rules and regulations and prices established by orders of the Coal Commission extend to all members of the public and not to individual consumers. The Interstate Commerce Commission has performed its duty of protecting the shipping public by acting upon the complaints and situations presented to it by individual members of a shipping public. The statement of the Supreme Court in *Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, is easily paraphrased to cover the right of Consumers' Counsel to protect the interest of the consuming public by prosecuting complaints for individual members who are typical of general classes and groups of consumers. The Court, speaking of an action by the Commission in determining the reasonableness of rates there said:

“But the proceeding before the Commission, to determine the reasonableness of the 2-cents advance, was not in the nature of private litigation between a lumber association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. *The finding thereon was general in its operation, and inured to the benefit of every person that had been obliged to pay the unjust rate.*”

There is no more typical cross-section of the coal-consuming public than that represented by Associated Industries of New York State and its members.

Respondent's Point 6: "The individual consumer petitioners were not parties in their own right to any petition filed before the National Bituminous Coal Commission and, therefore, cannot appeal under section 6(b)."

The individual consumer petitioners were named and the relevant facts regarding them were presented to the Commission under oath in the proceeding designated Docket No. 107-FD in which the order to be reviewed was made. The petition for reconsideration of this order and the petition renewing the petition for suspension of the minimum prices is set forth as Appendix B to the petition filed in this Court. The original petition for suspension of the minimum prices was filed on behalf of these companies and other members of Associated Industries of New York State. They were named as parties to the proceeding and the original petition was filed on their behalf. They were typical and illustrative representatives of the group on whose behalf the original petition was filed. They were, as members of a class, the real parties in interest.

Respondent's Point 7: "If this Court should be of the opinion that petitioners were entitled to make complaint to the Commission, as petitioners assert, and as the respondent denies, the petitioners did not exhaust the administrative remedy afforded them by the Act before filing their petition in this Court."

It is not necessary for petitioners to exhaust their administrative remedies before appealing to this Court to modify a wholly arbitrary and illegal order made in a proceeding to which they were parties. If a contrary rule were to apply the 60-day limitation provided in Section 6(b) would bar from review all illegal orders made more than 60 days prior to final administrative action. Should the present petitioners proceed with efforts to obtain administrative relief before the Coal Commission they would find themselves unable later to have this Court review the order made on December 15, 1937, refusing to suspend the minimum prices and dismissing the petitions praying such suspension. Such a point was urged before the Supreme Court in *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, and overruled. It was there contended that suit was not maintainable because the plaintiff shipper had not exhausted his administrative remedies before the Commission. The Court said (562):

"The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; . . . at least, not until after a remedy has been sought under Sections 13 and 15 of the Act to regulate commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the

remedy must have been sought primarily by proceedings before the Commission. * * * but plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discriminatory, or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory power; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

The position of the petitioners in the present proceeding does not raise any administrative question for decision by the Coal Commission. Their position is that the order of dismissal is wholly arbitrary and illegal and that the Commission was by the statute and by the Constitution bound and required to suspend the minimum price orders. An appeal lies to this Court within the 60-day period provided in Section 6(b) to review this order and to have it modified to conform to law.

It may not be contended that the minimum price orders were properly made without the hearing and findings of fact required in Section 2(a). Leaving aside the question whether the minimum price orders are, due to the Commission's failure to hold hearings, not directly reviewable under Section 6(b) because there was no proceeding, such orders do come under the hearing and finding requirements of Section 2(a). They are plainly rules and regulations having the force and effect of law. The statute prohibits any code producer from selling coal at less than the minimum prices determined by the Commission and provides that any producer selling at less than these prices shall

have violated the code and subjected himself to expulsion from the code and to payment of the prohibitive taxes provided in Section 3 (Section 4, Part II, Subsection (e); Section 5 (b)). The statute delegates to the Commission the determination of the minimum prices which must not be violated and which are the rule having the force and effect of law. Similarly the Interstate Commerce Act does not prescribe the rate to be changed. It prohibits the charging of an unreasonable rate or any rate in excess of reasonable rates. The Interstate Commerce Commission in determining a reasonable rate establishes a rule and regulation having the force and effect of law. In *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, the decision turned on whether the reasonable rate prescribed by the Commission for the future was a rule of law. The Court held that it was as much so as if Congress had named it in the statute.

For the foregoing reasons it is respectfully submitted that respondent's motion to dismiss should be denied.

This memorandum brief has been prepared and filed without opportunity to examine any brief by respondent in support of its motion to dismiss. The opportunity to reply to any brief filed by respondent in support of its motion is respectfully requested.

Respectfully submitted,

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February 19, 1938.